No. 79-886

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE UPJOHN COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL RESPONDENT

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OPINIONS BELOW

The opinion of the United States Magistrate (Pet. App. B), which was adopted by the district court (Pet. App. C), is not officially reported. The opinion of the court of appeals (Pet. App. C) is reported at 600 F.2d 1223.

JURISDICTION

The judgment of the court of appeals was issued on June 28, 1979 (Pet. App. F). On September 10, 1979, the court of appeals denied a petition for rehearing, with suggestion for rehearing en banc (Pet. App. E).

The petition for a writ of certiorari was filed on December 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the attorney-client privilege protects against the compelled disclosure of communications between an attorney employed by a corporation and the corporation's employees only when such employees play a substantial role in directing the corporation's response to the legal advice sought.

2. Whether the work product doctrine of *Hickman* v. *Taylor*, 329 U.S. 495 (1947), protects against compelled disclosure of documentary evidence sought by an internal revenue summons where the Internal Revenue Service shows necessity for disclosure.

STATEMENT

1. During an audit of petitioner The Upjohn Company's consolidated federal income tax returns for 1972 and 1973, the Internal Revenue Service discovered that since January 1, 1971, Upjohn and its subsidiaries had made payments of approximately $4.4 million to officials of many of the 136 foreign countries in which they conduct business (Pet. App. A 2a). It appeared that these payments were in the nature of bribes or kickbacks paid to foreign government employees to influence their action. The fact of such improper payments was apparently known by certain of Upjohn's inside directors and officers asso-

ciated with its international operations (Pet. App. B 12a).

Prior to the commencement of the Service's investigations, Upjohn had directed its in-house counsel (petitioner Gerard Thomas, who served as Upjohn's vice-president, secretary, and general counsel), along with outside counsel, to conduct an internal investigation of these improper or questionable foreign payments. This internal investigation was prompted, in part, by Upjohn's concern that it had not properly reported the payments to the Securities and Exchange Commission. Upjohn thereafter filed two reports with the S.E.C., voluntarily disclosing detailed information with respect to some, but not all, of the questionable payments. Upjohn made these disclosures in the hope of obtaining lenient treatment by the S.E.C. Upjohn also made the reports available to the Internal Revenue Service, which then commenced its investigation of the matter to determine the federal income tax consequences of the payments (Pet. App. A 2a).

Upjohn provided the Internal Revenue Service with details of $700,000 worth of the payments which it conceded might affect its federal income tax liability. However, it furnished the Service with considerably less detailed information with respect to the other $3.7 million of questionable payments, claiming that the remaining portion did not affect its tax liability. Although Upjohn made its employees available for questioning by the Service, it refused to permit them to answer questions about the $3.7 million of questionable payments (Pet. App. A 2a).

Because Upjohn's limited disclosure with respect to $3.7 million of the improper payments was inadequate to permit an independent evaluation of their tax consequences, the Internal Revenue Service sought production from Upjohn's general counsel of the documents generated in the course of the internal investigation. Those documents were in part responses by 53 of the company's foreign general and area managers to written questionnaires prepared by the general counsel. In addition, the documents consisted of written notes made by the general counsel and two outside counsel of telephone or personal interviews of all corporate employees to whom the foreign payment questionnaire had been sent, as well as 33 other employees who had not received a questionnaire (Pet. App. A 2a; Pet. App. B 13a).

Upon Upjohn's refusal to make available the corporate documents generated in its internal investigation of the improper foreign payments, Special Agent David E. Nowak of the Internal Revenue Service issued a summons to the company and its general counsel to appear and testify concerning Upjohn's tax liability for 1972-1974. The summons directed petitioners to produce "[a]ll files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made * * * since January 1, 1971 * * *" (Pet. App. B 9a, 11a).

Petitioners refused to produce the records sought by the summons on the grounds that they were protected

by the attorney-client privilege and the work product doctrine. Pursuant to 26 U.S.C. 7402(b) and 7604(a), the United States and Special Agent Nowak commenced this proceeding to enforce the summons in the United States District Court for the Western District of Michigan. The case was referred to a magistrate who, after holding a hearing, found that "the summoned material is not shielded from disclosure by the attorney-client privilege, nor by the work product doctrine, and that the standards required for judicial enforcement of the summons have been met" (Pet. App. B 37a). He therefore recommended that the summons be enforced (*ibid.*). The district court adopted the magistrate's recommendation and ordered the summons enforced (Pet. App. C 39a-40a; Pet. App. D 41a-42a).

2. The court of appeals affirmed in part, reversed in part, and remanded the case to the district court for further findings of fact (Pet. App. A 1a-8a). It agreed with the district court that the scope of the attorney-client privilege in the context of communications between in-house counsel and corporate employees was limited to the "control group" of the corporation, *viz.*, those senior officers who play a substantial role in directing the corporation's response to the legal advice given. In so holding, it rejected petitioners' claim that the applicability of the privilege should be governed by the "subject matter" test. Pursuant to this test, if the corporate employee possesses information acquired in the ordinary course of business relating to the subject matter of his employ-

ment and the information is communicated confidentially to corporate counsel to assist him in giving legal advice to the corporation, then the communication is privileged (Pet. App. A 4a-7a). In the court of appeals' view, the "subject matter" test would "encourage corporate managers to shield themselves from information about possibly illegal transactions" (*id.* at 5a-6a) and create a "broad 'zone of silence' " (*id.* at 7a).

However, because the record indicated that some of the communications sought by the summons were made by senior corporate officers who were in all likelihood members of the "control group," the court of appeals remanded the case to the district court for further findings and to deny enforcement of the summons to these "control group" communications (Pet. App. A 7a).

3. The court of appeals also rejected petitioner's claim that the documents sought by the summons were protected by the work product doctrine. It left undisturbed the district court's finding (Pet. App. B 30a) that "the record establishes ample necessity for compelling disclosure of the summoned material in this case, and that the work product doctrine does not shield the material from such disclosure." However, the court of appeals also expressed the view that "[t]he work product doctrine of *Hickman* v. *Taylor* [329 U.S. 495 (1947)] and Fed. R. Civ. P. 26(b)(3) is not applicable to administrative summonses issued under 26 U.S.C. 7602" (Pet. App. A 7a n.13). As the court of appeals concluded, "[t]he IRS simply must

show that the inquiry is relevant to a good faith investigation conducted pursuant to a legitimate purpose, that the information sought is not in the IRS' possession and that proper administrative procedures have been followed. *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964)" (*ibid.*).

DISCUSSION

1. The courts of appeals have divided over the proper scope of the attorney-client privilege in the context of communications from corporate employees to the corporation's counsel. Under the "control group" test, applied by the court below in the instant case, the privilege is limited to communications from those senior officers or employees who control or play a substantial role in any decision the corporation may make as a result of the advice of counsel. This test has been adopted, as well, by both the Tenth Circuit in *Natta* v. *Hogan*, 392 F.2d 686 (1968) and the Third Circuit in *In re Grand Jury Investigation (Sun Company, Inc.)*, 599 F.2d 1224 (1979). Accord: *United States* v. *Amerada Hess Corporation*, No. 79-1317 (3d Cir. Jan. 18, 1980), slip op. 12.[1]

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[1] See *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), petition for mandamus and prohibition denied, 312 F.2d 742 (3d Cir. 1962), cert. denied, 372 U.S. 943 (1963). See also *Virginia Electric & Power Co.* v. *Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397 (E.D. Va. 1975); *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pa. 1970); *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963); *United States* v. *International Business Machines Corp.*, 66 F.R.D. 154 (S.D.N.Y. 1974).

Two other circuits, however, have applied a broader privilege under the so-called "subject matter" test. Under this approach, first announced in *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487 (7th Cir. 1970) (per curiam), aff'd by an equally divided Court, 400 U.S. 348 (1971), the communication is privileged without regard to the employee's place within the corporate hierarchy if it is made by the employee at the direction of his superiors and the subject matter of the communication concerns the performance of the employee's duties. In *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596 (8th Cir. 1977) (en banc), the court adopted the subject matter test with the modification that the employee's communications must have been for the purpose of securing legal advice (see 572 F.2d at 609).

We agree with petitioners (Pet. 9) and the various amici curiae that review by this Court is warranted to resolve the conflict among the courts of appeals. The issue is important not only for the enforcement of the internal revenue laws but could also arise in other disputes between a federal agency and a corporation. Moreover, as the decisions of the lower courts demonstrate, the question is significant as well in the context of private litigation. Hence, we do not oppose the petition with respect to the first question presented in order to establish a uniform rule with respect to the attorney-client privilege.[2]

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[2] Rule 501 of the Federal Rules of Evidence states that in the absence of any constitutional or statutory provision or

2. The court of appeals also rejected petitioners' claim that the documents sought by the Internal Revenue Service were covered by the qualified privilege of the work product rule of *Hickman* v. *Taylor*, 329 U.S. 495 (1947). There, this Court held that information gathered by an attorney in anticipation of litigation is privileged from compelled disclosure unless the party seeking production can show necessity or that denial of discovery would unduly prejudice the preparation of his case or cause him any hardship or injustice.

Here, the court of appeals held that the work product doctrine does not apply to an administrative

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judicial rule, "the privilege of a witness * * * shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The federal courts have accordingly looked to "federal common law" in determining the scope of evidentiary privileges in summons enforcement proceedings or in analogous grand jury proceedings. See, *e.g.*, *United States* v. *Hodge and Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977); *Colton* v. *United States*, 306 F.2d 633, 636 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963). See also *In re Grand Jury Impaneled January 21, 1975*, 541 F.2d 373, 379 (3d Cir. 1976); *In re Special April 1977 Grand Jury*, 581 F.2d 589, cert. denied, 439 U.S. 1046 (1978); *United States* v. *Holmes*, 594 F.2d 1167, 1171 (8th Cir. 1979); *In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977).

Thus, this Court's resolution of the conflict among the circuits with respect to the question presented involving the attorney-client privilege will establish a uniform rule for summons enforcement and grand jury proceedings, federal criminal cases, and other cases involving claims arising under federal statutes.

summons issued by the Internal Revenue Service (Pet. App. A 7a-8a n.13). With respect to this question, the courts of appeals have expressed disparate views as to whether the doctrine applies in a summons enforcement proceeding (see *United States* v. *Nobles*, 422 U.S. 225, 247 n.6 (1975) (White, J., concurring)). Compare *United States* v. *McKay*, 372 F.2d 174, 176 (5th Cir. 1967) ("relevancy of the work product privilege enunciated in the *Hickman* case to a proceeding for the enforcement of the Commissioner's summons may well be doubted"), with *United States* v. *Brown*, 478 F.2d 1038, 1041 (7th Cir. 1973) ("work product doctrine does have applicability to a proceeding for the enforcement of an Internal Revenue summons").[3] Recently, the Third Circuit expressed agreement with *Brown*, although it enforced the summons on the ground that the government had made the requisite showing of necessity because the work product in question was of minimal substantive content. *United States* v. *Amerada Hess Corp.*, *supra*, slip op. 14-16.[4]

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[3] In *McKay*, the court also held that the appraisal report at issue was in no sense the work product of a lawyer (see 372 F.2d at 177). In *Brown*, the court ruled that the Commissioner had shown sufficient cause to rebut the taxpayer's work product claim (see 478 F.2d at 1041).

[4] The Internal Revenue Service summons authority has been analogized to the grand jury subpoena. See *United States* v. *Powell*, 379 U.S. 48 (1964); *United States* v. *Bisceglia*, 420 U.S. 141 (1975). The Second, Third, and Eighth Circuits

Here, the district court found (Pet. App. B 28a-30a) that the Internal Revenue Service had shown ample necessity for compelling disclosure of the summoned material. Even if applicable, therefore, petitioners' work product claim has been rebutted in this case. In these circumstances, we do not believe there is a true conflict among the circuits on the question whether the materials at issue are protected from disclosure by the work product rule, since no court of appeals has indicated that it would uphold a work product claim on these facts to defeat the enforcement of an Internal Revenue summons.[5] Hence, if the work product claim were the only question presented by the petition, we would oppose certiorari. However, in light of the fact that both questions presented involve closely related claims of privilege with respect

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have held that the work product rule is applicable to a grand jury subpoena. See *In re Grand Jury Subpoena Dated December 19, 1978, Issued to General Counsel, John Doe, Inc.*, 599 F.2d 504 (2d Cir. 1979); *In re Grand Jury Investigation (Sun Company, Inc.)*, 599 F.2d 1224 (3d Cir. 1979); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840 (8th Cir. 1973).

[5] In *In re Grand Jury Investigation (Sun Company, Inc.)*, *supra*, the Third Circuit held that similar materials sought by a grand jury subpoena were protected by the work product doctrine, and that the government had demonstrated good cause to overcome that protection with respect to questionnaires and interview memoranda generated by a deceased employee of the corporation because of the government's inability to secure the information from any more reliable source. However, the court deferred ordering production of all of the other materials sought until the government had subpoenaed witnesses before the grand jury (see 599 F.2d at 1228-1233).

to the identical material, we do not oppose granting the petition as to the work product question in the event the Court grants certiorari on the first question involving the attorney-client privilege.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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